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APPENDIX

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]

13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of
Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 9, 1968
CERTIORARI GRANTED DECEMBER 16, 1968

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District Court Docket Entries

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7/21/66	Petition for Writ of Habeas Corpus with Exhibits 1-6 attached filed.
7/21/66	Petition for Stay of Execution
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8/26/66	Order Denying Petition for Writ of Habeas Corpus
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8/29/66	Application for Certificate of Probable Cause
8/29/66	Order Denying Application for Certificate of Probable Cause
8/31/66	Copy of Order of Court of Appeals denying application for certificate and Stay
2/23/67	Copy of Order of Court of Appeals granting application for certificate of probable cause, and directing that Notice of Appeal be filed
2/23/67	Notice of Appeal

[1]

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

No. PB 66 C-52

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of
Arkansas State Penitentiary,

Respondent.

Petition for Writ of Habeas Corpus

(Filed: July 21, 1966)

To The Honorable United States District Court for the Eastern District of Arkansas:

The petitioner, William L. Maxwell, respectfully shows:

1. The jurisdiction of this court is invoked pursuant to Title 28 U. S. C. §2241(3) and §1 of the 14th Amendment to the Constitution of the United States.

2. The petitioner is a citizen of the United States and resident of the State of Arkansas. He is a member of the Negro race.

[2] 3. The petitioner is unconstitutionally and illegally restrained of his liberty by being confined and detained in the Arkansas State Penitentiary at Tucker, Arkansas. The person restraining petitioner's liberty is the respondent, O. E. Bishop, Superintendent of the Arkansas State Penitentiary.

4. Petitioner is confined as aforesaid under a sentence of death by electrocution imposed by the Circuit Court of Garland County, Arkansas on April 5, 1962 as the consequence of petitioner's conviction by that court on March 21, 1962 of the crime of rape. Petitioner is scheduled to be electrocuted at the Arkansas State Penitentiary pursuant to this conviction and sentence on September 2, 1966.

5. Following his conviction and sentence, the following proceedings occurred:

(a) Petitioner appealed to the Supreme Court of Arkansas which affirmed his conviction (*Maxwell* v. *State*, 236 Ark. 694; 370 S. W. 2d 113 (1963)), denied his subsequent petition for rehearing and set the date of his execution for January 24, 1964;

(b) Without applying for certiorari to the United States Supreme Court, petitioner, on January 20, 1964, filed here a petition for writ of habeas corpus, later twice amended, which as amended alleged that his conviction had been obtained in violation of rights guaranteed by the Constitution of the United States in that: (i) he was illegally arrested and there was an unlawful search and seizure of his house and person; (ii) he was tried in a hostile and prejudicial atmosphere; (iii) there had been racial discrimination in the selection of the jury which tried him; (iv) Ark.

Stat. §41-3403 was unconstitutionally applied and enforced against him because he was a [3] Negro charged with the rape of a white woman in Arkansas, where, pursuant to a long-standing custom and practice, Negroes charged with raping white women are usually sentenced to death while white men charged with rape or Negro men charged with raping Negro women are not typically sentenced to death in violation of the equal protection and due process clauses of the 14th Amendment, and, (v) the imposition of the death penalty upon him was cruel and unusual punishment contrary to the 8th and 14th Amendments.

(c) On January 21, 1964, this court issued an Order to Show Cause why the writ should not issue as prayed and stayed the execution of petitioner's sentence. After a hearing on petitioner's amended petition, this court, on May 6, 1964, dismissed the petition (*Maxwell* v. *Stephens*, 229 F. Supp. 205) and vacated the stay of execution. On May 19, 1964, petitioner noticed his appeal from that dismissal and on the same day, this court granted a certificate of probable cause to the United State Court of Appeals for the Eighth Circuit and stayed petitioner's execution pending the appeal.

(d) On June 30, 1965, the Court of Appeals affirmed the decision of this court (*Maxwell* v. *Stephens*, 348 F. 2d 325) and on December 6, 1965 the United States Supreme Court denied certiorari (*Maxwell* v. *Stephens*, —— U. S. ——, 15 L. ed. 2d 353).

6. On June 30, 1966, the Governor of the State of Arkansas set a new execution date for petitioner of July 15, 1966 which on July 7, 1966 was stayed until September 2, 1966 by order of the Acting-Governor.

7. Petitioner respectfully shows that the judgment and sentence of death rendered against him by the Circuit Court of Garland County, Arkansas, was void and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States because petitioner is [4] a Negro who was sentenced to death for the rape of a white woman in the State of Arkansas, which State, its subdivisions and instrumentalities, including juries and administrative officers and agents, through policy, practice, custom and usage arbitrarily and discriminatorily impose the death penalty against Negroes charged with and convicted of raping white women, but does not impose the death penalty against white men charged with and convicted of rape in circumstances identical to those of Negro defendants. In support of this allegation, petitioner further shows:

(a) Since the decision of the Court of Appeals for the Eighth Circuit in petitioner's previous habeas corpus proceeding, the Supreme Court of the United States has granted certiorari in the case of *Sims* v. *Georgia*, Misc., No. 918, Oct. Term, 1965, to decide the following question as stated at 34 U. S. Law Week 3429 (June 20, 1966):

> "Where a Negro defendant sentenced to death in Georgia for the rape of a white woman offers to prove that nineteen times as many Negroes as whites have been executed for rape in Georgia in an effort to show that racial discrimination violating the equal protection clause of the Fourteenth Amendment produced such a result, may this offer of proof be disallowed?" [1]

[1] The Eighth Circuit in its opinion affirming the dismissal of petitioner's previous application for the writ has indicated that such an offer of proof may not be rejected but that the evidence previously

[5] (b) Since the decision of the Court of Appeals for the Eighth Circuit in petitioner's previous habeas corpus proceeding, petitioner has come into the possession of newly-discovered evidence, not heretofore available and which could not by the exercise of reasonable diligence have been presented prior to this time, which demonstrates conclusively the validity of his contention that the State of Arkansas discriminates against Negroes in the application of the death penalty for rape. This evidence consists of the results of a survey of rape convictions during the period 1945-1965 in a representative sample of nineteen counties comprising more than 47% of the population of the State of Arkansas. The survey was conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conduct such a study.

The results of the survey for the State of Arkansas have been subjected to regular and methodical analysis consistent with the best available sociological and statistical techniques for evaluating such data. Its basic conclusions are shown in the document annexed to this petition as Exhibit I and incorporated herein by reference. At the hearing of this cause, petitioner will adduce expert testimony which

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adduced was insufficient. See 348 F. 2d 329-331. The United States Court of Appeals for the Fourth Circuit has also heard oral argument on this question; its decision is pending in *Moorer* v. *State of South Carolina*, No. 10,526 argued May 30, 1966.

will further elucidate the results of the survey and demonstrate that the imposition of the death penalty upon Negro defendants convicted of rape in the State of Arkansas occurs disproportionately [6] frequently by reason of their race alone, and for no other cause. The affidavit of Norman C. Amaker, Esq. annexed to this petition as Exhibit 2 shows more fully the circumstances under which and the times at which the data for this survey was collected and analyzed.[2]

On the basis of the survey petitioner alleges that Negro defendants convicted of rape are sentenced to death with disproportionate frequency as compared to white defendants in the State of Arkansas; that differences in the rates of conviction of Negroes and whites for the crime of rape do not account for the differential frequency of imposition of the death penalty; that no pertinent differences relating to the offenders, victims, circumstances of the offense, or circumstances of the trial and conviction of Negro and white defendants account for the differential imposition of the death penalty; and that Negro defendants and this petitioner, are sentenced to death by the State of Arkansas and its instrumentalities solely on the ground of race in violation of the Fourteenth Amendment to the Constitution of the United States.

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[2] The sources of data were primarily prison and court records and trial transcripts. In some instances, personal interviews were conducted and newspaper accounts consulted. The data was recorded on a 28 page schedule which is annexed as Exhibit 3.

[3] The State of Arkansas in its brief in this court stated:

"There is a dearth of information as to the circumstances of the 19 Negroes who have been electrocuted for the crime of rape. There is no evidence of the number of Caucasians and Negroes charged, the results of their trials, the circumstances of the crime or the character of the victim and the accused. The one

[7] 8. Since the decision of the Court of Appeals for the Eighth Circuit in petitioner's previous habeas corpus proceeding, decisions of the Supreme Court of the United States have established that the proceedings in which petitioner was convicted and sentenced to death violated the Fourteenth Amendment to the Constitution of the United States. In this case, petitioner ought to be allowed to show that his conviction and sentence were unconstitutional under the doctrines of these supervening decisions. In support of these contentions, petitioner further alleges:

(a) The sentence of death imposed upon petitioner was determined by a jury pursuant to Arkansas statutes §§41-3403 and 43-2153. Neither these statutes, nor any construction of them by the courts of the State of Arkansas, nor the trial judge's charge in petitioner's case, limited or directed in any way the unfettered discretion of the jury to choose between the sentence of life or death. The jury's choice was thus unregulated by legal principles of general application, was left to be determined by arbitrary and discriminatory considerations, and was in fact arbitrary and discriminatory in petitioner's case. The unconstitutionality of this practice is determined by the decision of the Supreme Court of the United States in *Giaccio* v. *Pennsylvania*, —— U. S. ——, 15 L. ed. 2d 447 (1966).

(b) The grand and petit juries which indicted and convicted petitioner were selected by the jury commissioners of Garland County from jury lists which revealed the race

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element totally ignored by petitioner is that in this particular crime, as in the case at bar, the defense of consent is paramount."

The analysis of the results of the Arkansas Capital Punishment Survey properly interpreted by oral testimony, supplies this "dearth of information" since the effect of the indicated factors is analyzed.

of jurors and were compiled in turn from racially designated poll tax books. The use of these lists constitutes a per se violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In *Sims* v. *Georgia,* Misc. No. 918, Oct. [8] Term, 1965, the Supreme Court granted certiorari to determine the following question as stated at 34 U. S. Law Week 3429 (June 20, 1966):.

> "Is a conviction constitutional where: (a) local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such books;"

(c) On information and belief, petitioner at the time of his trial and sentence to death was mentally incompetent to be tried being by reason of mental disease and deficiency incapable of understanding the proceedings against him and assisting counsel in his defense. Petitioner was not afforded a hearing on his competency to stand trial. His trial, conviction and sentence under these circumstances denied him due process of law under the Fourteenth Amendment to the Constitution of the United States as construed in *Pate* v. *Robinson,* —— U. S. ——, 15 L. ed. 2d 815 (1966).

9. Petitioner was convicted and sentenced to death by a jury pursuant to Arkansas statutes §§41-3403 and 43-2153. These statutes require that the issues of guilt or innocence and of life or death sentence be determined by a jury simultaneously, after the jury has heard evidence on both issues in the same proceeding. This procedure denied petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States because evidence per-

tinent to the question of penalty could not be presented without prejudicing the jury against the petitioner on the issue of guilt. Cf. *Jackson* v. *Denno*, 378 U. S. 368 (1964). Nor could petitioner exercise his constitutional right of allocution before the jury which sentenced him, without thereby waiving his privilege against self-incrimination held applicable to the states under the Fourteenth Amendment in *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

[9] 10. On information and belief, petitioner is presently insane and lacks the power of understanding to appreciate the penalty being imposed upon him. His execution under these conditions constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States, as incorporated in the Fourteenth Amendment, and further denies him due process of law in that his execution is barbaric and without legitimate purpose.

In support of this contention, petitioner further alleges:

(a) On July 7, 1966, petitioner, through one of his attorneys, requested respondent via telephone to permit a competent psychiatrist to examine petitioner at the Arkansas State Penitentiary. Respondent refused petitioner's request stating that he would allow such an examination only pursuant to a court order.

(b) Thereafter, on Tuesday, July 13, petitioner's attorney renewed his request by mail. A copy of this letter is attached hereto as Exhibit 4. By letter received by petitioner's attorney on July 15, respondent again denied petitioner's request on the stated grounds. A copy of this letter is annexed as Exhibit 5.

(c) Subsequently, petitioner's attorney, George Howard, Jr., consulted by telephone with a judge of the Circuit Court of Garland County and in person with a judge of the Circuit Court of Jefferson County both of whom informed Mr. Howard that neither court had authority under Arkansas law to issue an order requiring respondent to permit a psychiatric examination of petitioner. The affidavit of Mr. Howard annexed hereto as Exhibit 6 and incorporated herein by reference, more fully describes the circumstances of his attempt to have petitioner examined.

[10] (d) Pursuant to Ark Stat. §43-2622, respondent, on a showing of probable cause to believe petitioner is insane, has discretionary authority to transfer petitioner to the Arkansas State Hospital for a mental examination. The inability to secure a psychiatric examination of petitioner prevents a showing of probable cause sufficient to satisfy the requirements of this statute and also prevents petitioner from demonstrating his present insanity—if such an examination would show that he is in fact now insane—and hence violates petitioner's rights under the due process clause of the Fourteenth Amendment. See *Pate* v. *Robinson, supra.*

11. Petitioner has exhausted every remedy available in the courts of Arkansas and the Supreme Court of the United States to test the unconstitutionality of his conviction and death sentence.

12. WHEREFORE, petitioner prays:

(a) That a writ of habeas corpus be directed to the respondent issued on his behalf so that the petitioner may be brought before this court;

(b) That respondent be required to appear and answer the allegations of this petition;

(c) That petitioner be accorded the opportunity for a full evidentiary hearing on his allegations;

(d) That after full and complete hearing, this court reverse petitioner's conviction and relieve petitioner of the unconstitutional detention, imprisonment and sentence of death;

(e) That petitioner's execution now scheduled for September 2, 1966 be stayed by order of this court;

[11] (f) That the court grant such other, further and alternative relief as is just and proper under the circumstances.

Respectfully submitted,

WILLIAM L. MAXWELL
Petitioner

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

NORMAN C. AMAKER
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Philadelphia, Pa.

Attorneys for Petitioner

[18]

Response

(Filed: July 27, 1966)

For this response, respondent states:

I

Respondent admits the jurisdiction of the court.

II

Respondent admits that petitioner is a citizen of the United States and a resident of Arkansas and that he is a Negro.

III

Respondent admits having petitioner in his custody, said custody being pursuant to a valid court order. Respondent denies that petitioner is being unconstitutionally and illegally detained.

IV, V, VI

Respondent admits the allegations contained in paragraphs four, five, and six of the petition.

VII, VIII, IX, X

Respondent denies the allegations contained in paragraphs seven, eight, nine, and ten. Respondent states that these allegations were, or could have been, raised in the prior federal habeas corpus [19] proceedings. Respondent states that these allegations have been passed upon or have been waived by failure to present.

XI

Respondent admits that petitioner has exhausted every remedy available in the courts of Arkansas and the Supreme Court of the United States to test the unconstitutionality of his convictions and death sentences.

Respondent states that petitioner has also exhausted every remedy available in the courts of the United States, and that the case should be considered at an end.

XII

WHEREFORE, respondent asks that the petition be denied and petitioner be denied any relief.

Respectfully submitted,

BRUCE BENNETT
Attorney General

By: /s/ FLETCHER JACKSON
Fletcher Jackson
Assistant Attorney General
Justice Building
Little Rock, Arkansas

Attorneys for Respondent

[20]

Pre-Trial Conference Order

(Filed: August 5, 1966)

On this day a consolidated pre-trial conference was held in captioned cases. Luther Bailey, Petitioner in No. 46, appeared by Christopher C. Mercer, Jr. and E. V. Trimble, his regular attorneys; William L. Maxwell, Petitioner in No. 52, appeared by George Howard, Jr., his regular attorney; in addition Norman Amaker, Esq. of New York City appeared as additional counsel for both petitioners. Respondent appeared by Fletcher Jackson, Assistant Attorney General of the State of Arkansas. The following proceedings were had:

1. The Court first took up with counsel the Bailey case, No. 46. In that case the Court had previously directed that proceedings in line with the requirements of the Supreme Court of the United States in Jackson v. Denno, 378 U. S. 368, be had in the trial court, that is to say in the Circuit Court of Pulaski County, Arkansas. In the course of the discussion it developed that Bailey is seeking to raise in this proceeding certain questions which have not been presented by him to the State courts, and that consideration of those questions by those Courts may be had under the provisions of Criminal Procedure Rule 1 of the Supreme Court of Arkansas. Such being the case, and particularly [21] in view of the fact that a *Denno* determination must be made in the Circuit Court, this Court finds that the petition in No. 46 should be dismissed at this time without prejudice to future action after exhaustion of State court remedies under Rule 1, supra. An order to that effect will be entered.

2. Turning now to the Maxwell case, No. 52, it appears that Maxwell makes the following constitutional contentions:

a. That the Arkansas statute, Ark. Stats., §41-3403, which permits the death penalty to be assessed in cases of forcible rape has been applied in a racially discriminatory and unconstitutional manner to Negro men convicted of raping white women.

b. That the Arkansas statute, Ark. Stats., §43-2153, which permits a jury to determine by the exercise of its discretion and without specific guide lines whether a person convicted of a capital crime shall suffer death or life imprisonment is unconstitutional, and, further, that it is in any event unconstitutional for the death penalty to be imposed in a rape case.

c. That under Arkansas law in a prosecution for forcible rape the jury hears evidence which is simultaneously relevant to both guilt and punishment; that the defendant cannot take the stand to testify in mitigation of punishment without waiving his privilege against self incrimination; and that this situation amounts to a denial of procedural due process of law.

d. That racial discrimination was practiced in the selection of jurors by the Jury Commission of Garland County, Arkansas, in the Circuit Court of which County Maxwell was convicted.

e. That Maxwell was mentally incompetent to stand trial in the Circuit Court and is now laboring under such mental incompetency as to render it unconstitutional for the State [22] to put him to death.

Counsel for Maxwell are now cautioned that if they know of any other constitutional grounds on which his conviction and sentence may be subject to attack, they should advance those grounds in this proceeding since this Court would be most reluctant to consider in some subsequent proceeding any ground of attack which could have been raised in this proceeding.

3. No. 52 is now set for hearing on the merits to the Court at Little Rock at 10:00 A.M. on Monday, August 22, 1966. Respondent is directed to have Petitioner present at that time and place. It was agreed that the transcripts of Maxwell's trial in the Circuit Court and of his original habeas corpus proceedings before Judge Gordon E. Young of this Court will be available, and that either side may introduce in evidence such portions of those transcripts as it may see fit.

4. With regard to the claim that the Arkansas rape statute has been applied unconstitutionally, and with regard to the claim of discrimination in the selection of the jury, Maxwell will introduce oral testimony. Counsel for Respondent stated that he did not at the moment contemplate calling any witnesses.

Counsel for Maxwell indicated that he might want to call witnesses to testify as to Maxwell's alleged low mentality. The Court indicated that such testimony would probably not be received.

5. With respect to the claim that the Arkansas statute has been applied in an unconstitutional manner, will rely in part on the testimony of Dr. Marvin E. Wolfgang, a criminologist and statistician on the faculty of the Uni-

versity of Pennsylvania, and on certain studies and [23] a report made by Professor Wolfgang.

The studies and the report relate to 55 cases of forcible rape reported from 19 Arkansas counties during the period from 1945 through the summer of 1965. Basic data on those cases were gathered by law student field workers from various sources and were recorded on individual case schedules. Those schedules were later analyzed by Professor Wolfgang, and his conclusions are based thereon.

Naturally, Professor Wolfgang's conclusions depend for their validity on the validity and accuracy of the individual case schedules. It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.

Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no occasion for Petitioner to introduce the schedules in evidence or to prove the sources of the information reflected thereon or therein, or to call the individual field workers as witnesses.

[24] 6. It was agreed that between now and the date of hearing Respondent will make Petitioner available for a psychiatric examination at the University of Arkansas

Medical Center or some comparable institution, and that a report of such examination will be furnished to the Court on or before the date of hearing.

7. Counsel are directed to examine this order closely; any errors herein or omissions are to be called to the Court's attention within the next five days.

This the 5th day of August, 1966.

J. Smith Henley
United States District Judge

Memorandum Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF ARKANSAS

PINE BLUFF DIVISION

PB-66-C-52

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Respondent.

This is a habeas corpus proceeding wherein petitioner, William L. Maxwell, attacks collaterally for the second time his 1962 conviction in the Circuit Court of Garland County, Arkansas, of the crime of forcible rape. The sentence imposed upon him was death, Ark. Stats. Ann., §41-3403.

Petitioner, a Negro man, was charged with raping a 35 year old, unmarried white woman on the night of November 3, 1961. He pleaded not guilty and was tried before a jury. During the trial and during subsequent proceedings in the State court petitioner was represented by capable counsel of his own choice. Following the pronouncement of sentence and entry of judgment by the Circuit Court, petitioner appealed to the Supreme Court of Arkansas where his con-

viction was affirmed. Maxwell v. State, 236 Ark. 694, 370 S. W. 2d 113.

Subsequently, in early 1964 shortly before his scheduled execution petitioner filed in this Court a petition for habeas corpus challenging his conviction and sentence on a number of federal constitutional grounds. The case was assigned to District Judge Gordon E. Young who held a full evidentiary hearing and filed a detailed memorandum opinion denying the petition. Maxwell v. Stephens, E. D. Ark., 229 F. Supp. 205. The Court of Appeals, one judge dissenting, affirmed. Maxwell v. Stephens, 8 Cir., 348 F. 2d 325. In late 1965 the Supreme Court of the United States denied certiorari. Maxwell v. Stephens, 382 U. S. 944.

In due course the Governor of Arkansas scheduled the execution of petitioner for late July 1966; however, the execution was stayed administratively until September 2. That stay is still in effect.

Instant petition was filed on July 21, 1966. On August 5 a pre-trial conference was held, and the case was set for hearing on the merits on August 22. That hearing has been held as scheduled. The Court has given careful consideration to the materials before it, including oral testimony and documentary evidence. This opinion incorporates the Court's findings of fact and conclusions of law.

In the petition now before the Court petitioner alleges certain things that he alleged in his initial habeas corpus action; some things that were alleged in that action are not alleged here;[1] and the present petition contains some allegations that did not appear in the original proceeding.

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[1] Contentions made in the original proceeding and not urged here are: that petitioner was the victim of an unlawful arrest; that there was an unlawful search of petitioner's person and home; that evidentiary material was unlawfully seized in the course of the searches; that petitioner was mistreated physically and that a

Petitioner now contends that racial discrimination was practiced in the selection of the petit jury which tried and convicted him;* that it is unconstitutional to put anyone to death for the crime of rape;* that certain Arkansas statutes to be mentioned dealing with the crime of rape and the punishment to be imposed therefor have been applied unconstitutionally to Negro men convicted of raping white women;* that certain Arkansas statutes dealing with the imposition of the death penalty and certain Arkansas trial procedures in capital cases amount to a denial of due process of law; that petitioner was mentally incompetent to stand trial in the State court, and that his mental condition is now such that it would be unconstitutional to put him to death.[2]

In his pleadings respondent denies that any of petitioner's contentions have merit and, in addition, pleads res judicata, that is to say, respondent asserts that all contentions made here were either raised or could have been raised in the original proceeding in this Court and should not now be considered.

As far as respondent's plea of res judicata is concerned, it is settled that the conventional rule that issues which were litigated or which could have been litigated in an

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confession was extorted from him; that petitioner was tried in a hostile atmosphere. All of those contentions were considered and rejected by Judge Young; not all of them were urged on appeal; those that were were rejected by a majority of the Court of Appeals. This Court considers that all of the contentions not brought forward into this proceeding have been abandoned or that their lack of merit has been established in the original collateral attack on the State court judgment.

[2] The asterisks appearing in text indicate that the contention marked by the asterisk was raised in the original habeas corpus case.

original proceeding will not be again examined in a subsequent proceeding between the same parties or their privies does not apply with strictness to habeas corpus proceedings in the federal courts. Whether a federal court will entertain a successive application for a writ of habeas corpus, and whether and to what extent such a court will consider in connection with a successive petition matters which were or could have been determined in the original proceeding are questions addressed to the sound discretion of the court. See 28 U. S. C. A., §2244; Sanders v. United States, 373 U. S. 1; Simcox v. Harris, 8 Cir., 324 F. 2d 377. Of course, the fact that a specific contention brought forward in a successive application has been considered and rejected in connection with an earlier application is a factor to be considered by the court to which the successive application is addressed.

In this connection the Court in its pre-trial conference order in this case cautioned counsel for petitioner that if they knew of any constitutional grounds for attack on his conviction which had not been raised, such grounds should be brought forward in this proceeding since the Court "would be most reluctant to consider in some subsequent proceeding any grounds of attack which could have been raised in this proceeding." No contentions other than those previously mentioned have been made.

Taking up first the attack on the make-up of the jury, petitioner's complaint is that the Garland County jury commissioners chose the members of the jury panel from tax records identifying poll tax payers by race. That is the same complaint about the jury which was made in the original habeas corpus case, and the record here is the same as the one before the Court in that case. The matter was considered thoroughly by Judge Young and by the Court of

Appeals and, as indicated, the argument was rejected. This Court sees no occasion to reexamine the question and is not persuaded to do so by the action of the Supreme Court in recently granting certiorari in the case of Sims v. Georgia, 384 U. S. 998, noted in 34 U. S. Law Week 3429.

The Court finds it convenient to consider next the contentions with respect to the mental condition of petitioner.

As to the mental condition of petitioner at this time, it was agreed following the pre-trial conference that petitioner would be examined by the staff of the Arkansas State Hospital for Nervous Diseases. The examination was made and petitioner was found to be without psychosis. He thus, in effect, had the benefit of the post-conviction examination contemplated by Ark. Stats. Ann., §43-2622. In addition, at the request of counsel for petitioner he was examined by Dr. William G. Rees, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center. Dr. Rees also found petitioner to be without psychosis. Petitioner was present at the hearing and was observed by the Court; the Court noted no irrationality in petitioner's behavior, and petitioner gave no evidence of present mental incompetency. While the contention has not been abandoned formally, it has not been pressed, and the Court finds it to be without merit.

With respect to petitioner's mental incompetency in 1962 to stand trial for the offense allegedly committed in November 1961, the thrust of the argument seems to be not so much that petitioner was in fact mentally incompetent fo stand trial but rather that in the circumstances the Circuit Court was required to make a judicial determination of his competency, that no such determination was made, and that its absence voids the conviction. Pate v. Robinson, 383 U. S. 375; see also United States ex rel. Robinson v. Pate, 7 Cir., 345 F. 2d 691.

The facts in that case were that the defendant, Robinson, was tried to the court without a jury in Illinois on a charge of first degree murder; his defense was insanity, and his mental condition both at the time of the commission of the alleged offense and at the time of trial were directly in issue in the case. He had a long history of behavior indicating serious mental disease; that history was brought out by testimony in the course of the trial, and four witnesses testified that in their opinion defendant was insane. In the course of the trial the prosecuting attorney conceded that there was doubt as to the sanity of the defendant and suggested that a psychiatrist in the employ of Cook County be called as a witness. Notwithstanding the fact that a statute of Illinois provided that whenever the evidence raises a "bona fide doubt" as to a defendant's competency to stand trial, it is the duty of the judge on his own motion to impanel a jury to pass on the question,[3] the trial judge indicated that it was not necessary for the State to call the psychiatrist, did not impanel a jury to consider the question of Robinson's sanity, and found the defendant guilty without making any specific finding as to his competency to stand trial. Both the Court of Appeals and the Supreme Court held that this action amounted to a denial of due process of law.

The facts in this case are quite different from those in *Robinson.* As far as petitioner's mental competency is concerned, the transcript of the proceedings in the Circuit Court reflects the following:

On November 7, 1961, an information was filed by the Prosecuting Attorney charging petitioner with the crime of

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[3] Ill. Rev. Stat., c. 38, §104-2, referred to in the opinions of both the Supreme Court and of the Court of Appeals.

rape committed on November 3. On November 28, 1961, it having been made to appear to the Court that petitioner desired counsel and was without means to employ counsel, an order was entered appointing two members of the Hot Springs, Arkansas Bar to represent petitioner without charge. On November 30 those attorneys proceeding under the provisions of Ark. Stats. Ann., §§43-1301 et seq. filed a petition for an order committing petitioner to the State Hospital for observation and report;[4] on the same day the petition was granted and petitioner was committed for a period of not more than one month. Petitioner was delivered to the Hospital authorities on December 1, and the Hospital staff made its report on December 29.

The Hospital report, signed by Dr. E. W. Crow, the examining physician, and approved by Dr. George W. Jackson, the Hospital superintendent, contained a diagnosis of "without psychosis." The report recited that it was the opinion of the examining physician and of the joint psychiatric staff that petitioner "was not mentally ill, to the degree of legal irresponsibility at the time of this mental examination" and "was probably not mentally ill, to the degree of legal irresponsibility at the time of the alleged commission of his acts."[5]

On January 15, 1962, petitioner, still represented by his appointed attorneys, was arraigned and entered a plea of not guilty. No suggestion was made to the Circuit Judge that petitioner was not mentally competent to plead or to

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[4] The filing of such a petition is not an uncommon practice in Arkansas in cases involving sexual offenses even where there is no real question as to the sanity of the defendant; the request may be made as a precautionary measure or at least as a time gaining device.

[5] The language of the report tracks the language of the statute. See Trotter and Harris v. State, 237 Ark. 820, 822, 377 S.W. 2d 14, ...

stand trial. On February 5 the case was set for trial, but a telegram was received by the Prosecuting Attorney to the effect that Mr. Christopher C. Mercer, Jr., a Negro attorney of Little Rock, had been employed to represent petitioner; accordingly, the setting was cancelled, and the case was passed for the time being. On the same day Mr. Mercer moved for a continuance of the case. That motion was granted, and by agreement the case was set for trial on March 19. At this point in the proceedings petitioner's appointed counsel were permitted to withdraw from the case.

Prior to the trial the Circuit Court was not requested to hold any sanity hearing or to take any testimony as to the mental condition of the accused; insanity was not an issue at the trial. No question of petitioner's mental competency was raised in connection with his appeal to the Supreme Court of Arkansas nor in connection with the original habeas corpus proceeding which he filed in this Court.

Conceding that Pate v. Robinson, supra, emphasizes that it is a denial of due process of law to put a person to trial on a criminal charge when he lacks the mental competency to stand trial, this Court does not believe that that decision or any other decision makes it the constitutional duty of State trial judges to hold sanity hearings on their own motion simply because there has been a routine pre-trial psychiatric examination of the defendant resulting in a negative report.

Certainly, in connection with this successive application for habeas corpus this Court is not willing to hold that the absence of a sanity hearing in the State court deprived petitioner of any federally protected right. It must be remembered that at the trial of the case petitioner was represented by an attorney not only of his own choice but also

of his own race. Presumably, if petitioner had been unable to comprehend the nature of the proceedings, to understand the charges against him, or to communicate intelligently with his attorney relative to his defense, that inability would have manifested itself to counsel prior to or during the trial and counsel would have brought the matter to the trial court's attention.

After petitioner's conviction his attorney filed a long motion for a new trial attacking the conviction on 40 grounds; mental incompetency was not one of them.

In the course of the pre-trial conference in this case, which was attended by Mr. Mercer although he does not represent petitioner in this case, the question of petitioner's mental competency to stand trial was discussed to some extent and nothing was said which would indicate that there is any real basis for belief that petitioner was not mentally competent in 1962. Nor is there anything in the reports of the State Hospital Staff or of Dr. Rees, which would form the basis for such a belief. Petitioner may be of somewhat low mentality, but mere mental weakness is not the equivalent of mental incompetency to stand trial or to be held guilty of a crime.

Before discussing the remaining contentions of petitioner the Court considers it advisable in the interest of precision to make some general comments relative to sentencing procedures in the Arkansas courts.

In all non capital criminal cases, whether felonies or misdemeanors, which are tried to juries, the jury affirmatively fixes within statutory limits the punishment to be imposed. If the jury agrees that the defendant is guilty but is unable to agree on the punishment, it may, if it desires to do so, return the verdict of guilty and request the judge to fix the punishment.

In capital cases the procedure is somewhat different. Under the substantive criminal code of Arkansas the punishment, and the only punishment, provided for a capital offense, such as first degree murder or rape, is death by electrocution. However, by virtue of Act 187 of 1915, which now appears as Ark. Stats. Ann., §43-2153, a trial jury in a capital case has the right to render a "verdict of life imprisonment in the State penitentiary at hard labor" in lieu of the death penalty. But, if the defendant is found guilty and punishment is not assessed at life imprisonment, the legal penalty is automatically death.

It is thus not correct, strictly speaking, to say that Arkansas juries "impose the death penalty" on anyone. Rather, those juries have the right in a sense to exercise clemency toward particular defendants by assessing the penalty of life imprisonment at hard labor in a capital case.

The Arkansas statutes attacked by petitioner in general and in their application to Negro men convicted of raping white women are Ark. Stats., §41-3403 and §43-2153, read together.

The basic argument that it is unconstitutional to inflict the death penalty upon any person for the crime of rape presents a question of law only which has been ruled upon adversely to petitioner by Judge Young and by the Court of Appeals. A possible variant of that basic argument to the effect that it is unconstitutional to permit a jury of twelve people, with responsibility divided among them, to determine ultimately whether a person convicted of a capital crime shall suffer death or be imprisoned for life is likewise rejected by this Court. If a State can constitutionally impose the death penalty for a crime, this Court sees no constitutional objection to permitting a jury rather than a trial judge to decide whether that penalty shall be imposed

in a particular case. And in this connection it might be pointed out that the obvious purpose of section 43-2153 is to permit juries to extend a degree of mercy to defendants convicted of capital crimes, not to make the assessment of the death penalty easier or more likely.

The argument is made, however, that in any event it is a denial of due process to permit a jury to make its determination solely by the exercise of its collective discretion without standards or guide lines laid down in the statutes or judicial decisions, or in the instructions of the court.

It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death.*

The Court does not think, however, that it is constitutionally necessary for specific standards or guide lines to be laid down or brought to the attention of the jury. Whether a convicted rapist or murderer is to suffer death, on the one hand, or life imprisonment, on the other, remains under Arkansas procedure, within the discretion of the jury, to be exercised in the light of the judgment, common sense, and experience of the jurors. Jurors are presumed

* It does not appear that counsel for petitioner requested any instructions on the subject.

to be persons of good judgment and common sense. If they do not know, without being told that in determining whether clemency should be extended in a given case they should take into consideration all of the relevant facts and circumstances shown in evidence and should weigh aggravating circumstances, if any, against mitigating circumstances, if any, no useful purpose will be served by telling them.

On this phase of the case petitioner again relies on a very recent Supreme Court decision, Giaccio v. Pennsylvania, 382 U. S. 399. Again, his reliance is misplaced.

Giaccio involved a peculiar, 1868 statute of Pennsylvania which permitted a jury in a misdemeanor case to determine by its verdict whether a defendant acquitted on a misdemeanor charge might nonetheless be taxed with the costs of the prosecution. Giaccio was tried on a misdemeanor charge; the jury found him not guilty but taxed him with the costs. The statute itself prescribed no standards by reference to which the jury was to determine whether an acquitted defendant should be charged with costs. However, Pennsylvania decisions had established that costs were not to be charged against an acquitted defendant unless his conduct had been "'reprehensible in some respect,' 'improper,' outrageous to morality and justice,' or that his conduct was 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs' or that though acquitted 'his innocence may have been doubtful.'" 382 U. S. at page 404. The jury was instructed "that it might place the costs of prosecution on the appellant though found not guilty of the crime charged if the jury found that 'he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of

conviction (and) . . . his misconduct has given rise to the prosecution.'" Ibid.

The trial court ultimately held the statute unconstitutional, but the State appellate courts disagreed. There was an appeal to the Supreme Court of the United States, and that Court held the statute unconstitutionally vague notwithstanding the construction which had been placed upon it by the courts of Pennsylvania. In concurring opinions Justices Stewart and Fortas thought it sufficient to say simply that it is unconstitutional to tax the costs of the prosecution against an acquitted defendant.

Evidently, the majority of the Court were not unmindful that it might be contended that the holding would be used to attack the practice prevailing in many States, including Arkansas, of permitting juries finding defendants guilty to fix the punishments within legal limits. And the Court expressly noted that it intended "to cast no doubt whatever on the constitutionality of (that) practice." 382 U. S. at page 405, f.n. 8.

It is true that in his concurring opinion Mr. Justice Stewart said (p. 405 of 382 U. S.):

> ". . . It seems to me that, despite the Court's disclaimer, much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. . . ."

Whether the interpretation which Justice Stewart place upon the reasoning of the majority turns out to be accurate

remains to be seen; for the present at least this Court will accept the majority's disclaimer at face value. And, the Court thinks that the Arkansas practice, which has been described, falls within the terms of the disclaimer.

The contention which has been urged most seriously here, and which has been ably argued by Professor Amsterdam of the University of Pennsylvania Law School, who is of counsel in the case, is that Arkansas juries customarily apply Ark. Stats. Ann., §§41-3403 and 43-2153 in a racially discriminatory and unconstitutional manner to Negro men who have been convicted of raping white women so that a disproportionate number of such defendants receive the death penalty. And it is argued that it makes no difference that the sentence results from negative jury action in failing to assess punishment at life imprisonment rather than from affirmative jury action in voting the sentence of death.

The same contention was made in the State courts and, as indicated, was urged before Judge Young and before the Court of Appeals. In those proceedings petitioner sought to establish his thesis by the use of execution records of the State of Arkansas and by records of sentences imposed in rape cases over a period of time in Garland, Pulaski, and Jefferson Counties. The statistics which petitioner was able to produce in the earlier proceedings were not convincing to the Courts concerned.

In the instant case petitioner relies upon the results of a study made in 1965 by Professor Marvin Wolfgang, a well qualified sociologist and criminologist on the faculty of the University of Pennsylvania. Dr. Wolfgang, whose qualifications to testify as an expert are not questioned and are established, testified at the hearing, and a written report prepared by him, together with certain other rele-

vant documentary material, was received in evidence without objection.

The background facts of the Wolfgang study may be summarized as follows:

In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc. to make a study of rape convictions in a number of southern States, including Arkansas to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women.

Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men.

No convictions of white men for raping Negro women were found.

Dr. Wolfgang found that of the 34 Negroes convicted of rape 10 had been sentenced to death and 24 had been sentenced to life imprisonment; the corresponding figures for the white offenders were 4 and 17. The witness did not consider that particular variation to be of great significance. But he did attach great significance to the fact that of the 19 Negroes convicted of raping white women 9, or nearly 50 percent, had been sentenced to death, whereas in other racial situations only 5 death sentences had been imposed, those 5 sentences representing only about 14 percent of the total sentences imposed in those situations.

Using recognized statistical procedures Dr. Wolfgang undertook to determine whether the differential in the imposition of the death sentence was due to some factor other than the association between Negro offender and white victim. He concluded, and the Court agrees, that the differential could not be due to the operation of the laws of chance.

The witness then proceeded to consider race in relation to certain variables appearing in rape cases,[*] and also to

[*] The figures just given relate to convictions and sentences imposed. Actually those figures involve some duplications of individuals. The overall record reflects that two Negroes were convicted twice of raping white victims and received the death sentence each time. One Negro was convicted twice of raping two Negro women and received a life sentence in each case. And two white men were each convicted twice of raping two white women; in each instance the original sentence imposed was life imprisonment, and the second sentence was death.

[†] Generally speaking, and subject to certain exceptions, the variables appear to the Court to be facts or circumstances which reasonably might be supposed to either aggravate or mitigate a given rape. Variables included, but were not limited to, such

consider sentences imposed in relation to such variables. He found that race had significant associations with certain variables but not with others, but he also found that in general the sentences imposed had nothing significant to do with the variables, other than the combination of Negro offenders and white victims.

Without stopping to go into further detail, the Court will state that it understands Dr. Wolfgang's conclusion to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands only about a 14 percent chance of receiving the death sentence.

Petitioner has made no effort here to show that the individual jury which tried and convicted him acted in his particular case with racial discrimination. Rather, petitioner urges that a showing of a pattern of racial discrimination in the imposition of the death penalty makes a prima facie showing of such discrimination in a particular case; that a failure of an Arkansas jury to assess punishment at life imprisonment in a capital case is tantamount to an assessment of the death penalty; and that it is unconstitutional for a jury to permit a death sentence to be imposed on a Negro man convicted of raping a white woman if it would have assessed a penalty of life imprisonment had the defendant been white and had he raped the same woman in the same or similar circumstances.

In appraising petitioner's contention and in weighing the testimony and report of Dr. Wolfgang the Court lays to

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factors as age of defendant, age of victim, degree of force, degree of injury, weapon use or display, and marital and family status of offender and victim.

one side the fact that in Sims v. Georgia, supra, the Supreme Court has agreed to review, among other things, the question of whether a Georgia trial court committed error in refusing to hear testimony to the effect that during a certain period in Georgia 19 times more Negroes than whites have received the death sentence in rape cases. In this case the Court has heard and considered all of the evidence which petitioner has offered.

While the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore the Court is not convinced that it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women or to require or justify the inference that the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment.*

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*Garland County was not included in the sample group of counties considered by Dr. Wolfgang. Garland County statistics were before Judge Young in the original habeas corpus proceedings and were summarized in the opinion of the Court of Appeals. Maxwell v. Stephens, supra, 348 F. 2d at 330. Those figures revealed that in the ten year period beginning January 1, 1954, seven white men and three Negroes were charged with rape in that county. Two of the victims of the white men were white; the races of the other victims of those men were not disclosed. The victims of the Negro offenders were two Negro and one white woman. Charges against four of the white men were not pressed; the other three were convicted of lesser crimes. The charges against one of the Negroes was dismissed, and a second was convicted of a lesser offense. The third, petitioner here, was convicted of raping a white woman and received the death sentence. There is no question that the facts and circumstances surrounding his offense were such as to justify the imposition of that sentence entirely apart from any consideration of race.

The study does not indicate that Negro men convicted of raping white women invariably or even in a majority of cases receive the death penalty. The study covered only 55 cases over a twenty year period in 19 Arkansas counties containing, according to the census of 1960 47 percent of the State's population, and after making allowances for duplications it appears that only 7 Negro men were sentenced to die for raping white women. The cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner.

As to the sample which was considered, Dr. Wolfgang said in his report that the included counties "are a stratified random sample of Arkansas counties, geographically dispersed throughout the State and representative of the State in urban-rural and white-Negro population ratios." Although the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically, the quoted statement of Dr. Wolfgang is simply not correct, and this was recognized by Mr. Monroe and is made clear by an examination of a map of the State attached to the report.

The Negro population of Arkansas is not distributed evenly over the State, nor is the State's overall population distributed evenly from the urban rural standpoint. An examination of the map which has been mentioned shows that the counties included in the sample are for the most part located in the southern and eastern portions of the State where the Negro population is heaviest and include most of the large urban centers in the State such as the Little Rock-North Little Rock metropolitan area, and the cities of Blytheville, El Dorado, Fort Smith, and Pine Bluff.

The variables which Dr. Wolfgang considered are objective; they are broad and in instances are imprecise. In connection with many of the cases studied the field workers were unable to obtain from available sources information which might have been quite pertinent, and Dr. Wolfgang's statistics really reveal very little about the details of the cases of the 7 individual Negroes who received the death sentence for raping white women as compared to the details of the cases in which other racial situations were involved.

Dr. Wolfgang himself recognizes in his report and in his testimony that his conclusions are subject to attack from certain angles due in large measure to the small number of cases studied and lack of available information in many of those cases. In his report he states frankly:

> "This report contains a preliminary analysis of data obtained in a study designed to determine the effect of racial factors upon capital sentencing for rape in the State of Arkansas. The preliminary analysis is neither exhaustive nor conclusive. Its findings presented below, are tentative and are based upon an exploratory investigation of the available data. Interpreting the results must be done with caution. Subject to this qualification, the preliminary analysis strongly suggests that racial discrimination is operative in the imposition of the death penalty for rape in Arkansas."

On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact the Court doubts that such discrimination, which is highly subjective matter, can be detected accurately by a statis-

final analysis can be made conclusive here. Statistics are elusive things at best, and it is a truism that almost any thing can be proved by them.

The Court does not intend to belittle either the study made by Dr. Wolfgang or his testimony. But the Court is perhaps not convinced by them any more than the Supreme Court of Arkansas, Judge Young, and the Court of Appeals were convinced by the materials previously submitted.

In his opinion Judge Young aptly stated that the issue of consistency always involved in rape cases. In cases not involving inter-racial situations the issue of consent may be and frequently is very real; that arises from a factual standpoint is much less likely to be present in cases in which white women have been attacked by Negro men. And the discrimination between death sentences imposed on Negro men convicted on inter-racial rape and such sentences imposed in other rape cases may well be explainable in large measure to the fact that in the former cases the trial jurors may have a firmer and more positive conviction of the truth of the charges than in cases of the latter type.

The final contention to be discussed does not involve any Arkansas statute but does involve Arkansas criminal procedure generally. Under that procedure the State puts on its evidence first and in many types of cases, including rape cases, evidence which is relevant to guilt is also relevant to punishment. When the State has completed its presentation, the defense may or may not introduce evidence, and the defendant may or may not testify in his own behalf. If he does testify, he waives his privilege against self-incrimination with respect to the charge against him, and may be cross-examined as fully as any other witness. The deliberations of the jury relate to both the

[illegible] and the question of punishment, there is no [illegible] before the jury as to the proper [illegible] which the defendant should receive.

Petitioner, who did not take the stand in the course of the trial in the Circuit Court, attacks as unconstitutional the procedure which has been outlined. He alleges that the procedure is unconstitutional because evidence pertinent to the question of guilt could not be presented without prejudicing the jury against the petitioner on the issue of guilt, and because he could not exercise his constitutional right of allocution before the jury which contemplates his [illegible] without thereby waiving his privilege against self incrimination.

In effect, petitioner contends that where a State leaves the matter of punishment to a jury's determination the Constitution requires that the issue of guilt or innocence first be tried out, and that if the defendant is found guilty, a separate hearing must be held before the jury on the question of punishment at the course of which hearing the defendant can testify as to mitigating circumstances without prejudice to himself since his guilt has been determined already.

While some States follow that procedure, this Court has held before that it is not constitutionally required. The Court does not consider this [illegible] [illegible] [illegible]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Appellant,	Appeal from the United States District Court for the Eastern District of Arkansas
Appellee.	

Circuit Judges

[redacted] an Arkansas prisoner [redacted] conviction for the [redacted] Ark Stat Ann § 41-3401 [redacted] a federal writ

[redacted] at the time of the offense and Maxwell's [redacted] and was replaced by [redacted] separates the crime of rape into [redacted] rape in the first degree is among [redacted] female by forcible compulsion [redacted] age conditions Section 41-2403 [redacted] conviction of rape a punishment [redacted] imprisonment also was by § 3 [redacted] and replaced The replacement [redacted] for sentences within prescribed [redacted] rape and for first degree [redacted] imprisonment If the offense [redacted] committed since the effective [redacted] rape in the first degree

of habeas corpus and, with its denial, a second time appeals. The points now urged to us are (1) that a prima facie case of racially discriminatory imposition of the death penalty for rape in Arkansas has now been established and remains unrebutted by the State; (2) that Arkansas' single verdict procedure is without appropriate standards, allows the jury to exercise its discretion irrationally, and is impermissible; and (3) that the decisions of the United States Supreme Court since Maxwell's first federal appeal demonstrate the error of our prior holding, adverse to the petitioner, on the jury selection issue.

We again review the background:

1. The offense for which Maxwell was charged was committed in the early morning of November 3, 1961, in the City of Hot Springs, Garland County, Arkansas. Maxwell, who was 21 at the time, was arrested within two hours after the offense was committed. His convicting jury did not "render a verdict of life imprisonment in the State penitentiary at hard labor", as it had the option to do [since 1915 (Acts 1915, No. 187, § 1, p. 774)] under §§ 43-2153 and 41-3403 and for which it had been given an alternate verdict form. Accordingly, and in line with the interpretation consistently given the statutes by the Supreme Court of Arkansas, *Kelley* v. *State*, 133 Ark. 261, 202 S.W. 49, 54 (1918); *Stewart* v. *State*, 233 Ark. 458, 345 S.W.2d 472, 475 (1961), cert. denied 368 U.S. 935, the trial court imposed the death sentence.

2 The petition itself also suggests, on information and belief, that Maxwell "is presently insane." At the hearing in the district court, defense counsel acknowledged that "[T]he report [from Dr. William G. Reese, Professor of Psychiatry and head of the Department of Psychiatry at the University of Arkansas Medical Center] states, in effect, that the petitioner is without psychosis. . . ." The defense's appellate brief recites that the insanity suggestion, "though dealt with by the district court, in its opinion, was not pressed below and is not relevant here".

2. Maxwell appealed. On this state appeal he challenged the sufficiency of the evidence; his prosecution by information; the constitutionality in application of the penalty statute, § 41-3403; the denial of his motion that his case be removed to federal court; the overruling of certain objections relating to voir dire; the overruling of objections as to latitude in his cross-examination of witnesses; the admission of evidence; the instructions; and aspects of the prosecution's argument to the jury. All these points were decided adversely to the defense and the judgment of conviction was affirmed by a unanimous Supreme Court of Arkansas (one justice not participating). *Maxwell v. State*, 236 Ark. 694, 370 S.W.2d 443 (1963). No petition for certiorari was filed with the Supreme Court of the United States.[5]

3. Maxwell, with new counsel, then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas. In that petition, as twice amended, he alleged the illegality of his arrest; impropriety of the search of his person; impropriety of the search of his home; mistreatment by the police; coerced confessions; an adverse and hostile trial atmosphere; racial discrimination in the selection of his jury; unconstitutional application of § 41-3403; and unconstitutionality of the death penalty for rape. Judge Young decided each point so raised adversely to the defense and denied the petition. His detailed opinion is reported as *Maxwell v. Stephens*, 229 F.Supp. 205 (E.D. Ark. 1964).

4. Judge Young, however, granted the certificate of probable cause required by 28 U.S.C. § 2253 and stayed execution. With additional counsel from New York, an appeal

[5] This fact, of course, no longer constitutes a failure to exhaust available state remedies. *Fay v. Noia*, 372 U.S. 391, 435-38 (1963). *Curtis v. Boeger*, 331 F.2d 615 (8 Cir. 1964).

was taken to this court. We noted that, except for an early pretrial proceeding, the state trial court appointed attorneys were in the case. Maxwell had been represented through all the state and federal proceedings to date, although different, non-court appointed counsel. The points primarily argued to us were three: (1) that Maxwell was denied due process and equal protection because he was sentenced under statutes which are discriminatorily enforced against Negroes; (2) that he was denied due process and equal protection because the Garland County jury lists revealed race and were compiled from racially designated poll tax books; and (3) that the taking of Maxwell's coat and reference to it in testimony at the trial violated his Fourth, Fifth and Fourteenth Amendment rights. In what we thought was an opinion meticulously concerned with the several issues raised by Maxwell, we reached the conclusion that Judge Young's decision was correct. *Maxwell v. Stephan*, 348 F.2d 325 (8th Cir. 1965). The late Judge Ridge dissented on the search and seizure issue concerning the coat but agreed with all the other conclusions arrived at by the majority.

With still another name added to the list of Maxwell counsel, a petition for certiorari was filed. The writ was denied, with Mr. Justice Douglas being of the opinion that certiorari should be granted. 382 U.S. 944 (1965).

Execution was rescheduled but was stayed administratively until September 2, 1965.

Maxwell's second and present petition for a federal writ of habeas corpus was filed July 21, 1965 in the United States District Court for the Eastern District of Arkansas and came before Chief Judge Henley. The court denied the petition. *Maxwell v. Stephan*, 251 F. Supp. 110 (E.D. Ark. 1966).

this court's disposition of Maxwell's first habeas appeal. It is said, in the words of the petition:

> "This evidence consists of the results of a survey of rape convictions during the period 1945-1965 in a representative sample of nineteen counties comprising more than 47% of the population of the State of Arkansas. The survey was conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study."

The record and the evidence. At a pretrial conference the district court was advised that the evidence to be presented on behalf of Maxwell was that which resulted from the survey and study so described,[4] and that it would be presented through the testimony of Marvin Wolfgang, a criminologist statistician on the faculty of the University of Pennsylvania. It was agreed in pretrial that the survey's individual case schedules would be made available for inspection by counsel for the State. The court ruled that, subject to objections as to relevancy and materiality, Professor Wolfgang would be permitted to testify as an expert and to introduce his report as a summary exhibit. The State filed no objection to any of the individual case schedules. At the ensuing hearing the State agreed that the basic facts of the schedules, "that is, the age of the victim, the race, and so on, of the individual defendants, or the alleged victims", would stand admitted. Dr. Wolfgang then was called as a witness.

4 The study is said to be the same one with which the Fourth Circuit was concerned in *Moore v. South Carolina*, 368 F.2d 458 (4 Cir. 1966).

Dr. Wolfgang possesses the degree of Doctor of Philosophy in Sociology, with Criminology as a sub-field. He is Professor and graduate chairman of the Department of Sociology at the University of Pennsylvania. He is co-director of the Department's Criminological Center. He obviously is a man of scholastic achievement and of experience in his field. The State concedes that his "qualifications as a criminologist have never been questioned by the respondent".

The witness testified that in 1965 he was asked to participate in a study on capital punishment for rape and that this was suggested "as an appropriate topic for research analysis because of the underlying assumption that there is differential imposition of the death penalty in rape cases in certain states". This was to be "an effort to collect the appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption. The ultimate objective of the study was to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements". He was informed that the result might be used in litigation on behalf of defendants who had been convicted and sentenced to death for rape.

The study was carried out in twelve states. One of these was Arkansas. For the State of Arkansas the period investigated was that from January 1, 1945, to the summer of 1965. Not every Arkansas rape case during that period was included but every case which occurred in the sample counties was included.

The study produced 55 rape convictions in the 19 selected Arkansas counties. The witness prepared a preliminary analysis of the data contained in the schedules the student investigators prepared for these cases. Among

the variables considered were race of the defendant, race of the victim, and sentence. The approach was to develop a "null hypothesis" that there is no difference in the distribution of the sentence of death or life imprisonment imposed on negro and white defendants, the calculation of a theoretical frequency which represents the number of defendants expected to be sentenced to death if the null hypothesis is valid, the comparison of this theoretical frequency with the actual frequency in the collected data for each defendant victim racial combination, and the determination whether the discrepancy between the expected and the observed frequencies is great enough so that, under accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested rather than of the operation of chance within the testing process. "If that difference reaches a sufficiently high proportion, . . . then the assertion can be made that the difference is significant and could not have occurred by chance".

The data gathering was not limited to the facts of race and sentence. It included other items such as the defendant's age, family status, occupation, and prior criminal record; the victim's age, family status, occupation, husband's occupation, and reputation for chastity; aspects of the prior relationship, if any, between the defendant and the victim; the circumstances of the offense such as the number of offenders and victims, the place, the degree of threat or violence, and the injury inflicted; other offenses contemporaneously committed; the presence of third persons and threats or injury to them; the nature of the intercourse; the involvement of alcohol or drugs; and the circumstances of the trial and post trial proceedings. Data of this general kind were included because they were felt to be relevant to the imposition of the type of sen-

[illegible] and [illegible] rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of killing white victims." The authors conceded that some data potentially pertinent were not collected so, for example, that "with respect to the strength of the prosecution's case, for we had no information of that sort that we could objectively collect."

The study disclosed that, in the 55 Arkansas cases, 34 defendants were Negroes and 21 were whites; that 23 had a previous record; that 20 were known to have been in prison; that 47 victims were whites, 10 were Negroes, and the race of one was unknown; that of the victims, two had prior criminal records and 51 did not; that 10 victims had a good reputation for chastity and 4 had; that 14 received the death sentence and 41 life; that counsel was appointed in 49 cases and retained in 6; that in 20 cases the offender was known by the victim and in 28 he was unknown; that the offender and the victim had had prior sexual relations in 4 cases; and that in 13 cases a threat of cruelty was entered.

Upon this Virginia data and the study in California concluded:

> 1. Factors not significantly associated with either the defendant's race or with the sentence were the place of pilleage, nature of entry, plea, type of counsel, duration of trial, seriousness of injury to the victim, type of prior relationship between defendant and victim, the defendant's previous record, and the number of living dependent children.
>
> 2. Factors not significantly associated with the defendant's race were the commission of a contemporaneous offense and previous imprisonment.

3. Factors not significantly associated with the sentence were the defendant's marital status, his age, the victim's age, the display of a weapon, and the defendant's having dependent children.

4. Factors which were significantly associated with sentence were commission of a contemporaneous offense and previous imprisonment.

5. Factors which were significantly associated with the defendant's race were marital status (a greater percentage of Negroes than whites were not married), display of a weapon (more Negroes than white used one), the defendant's age (more Negroes were young), the victim's age (the defendants were white more frequently in the older-defendant-younger-victim combination), and the existence of children dependent on the defendant (more whites had them).

6. An anlaysis of significant association with defendant's race or the sentence was either unnecessary or not possible with respect to the victim's prior record, her reputation for chastity, the force employed, her pregnancy by the offense, prior sexual relations between the defendant and the victim, and the defendant's assertion of the defense of insanity.

The study covered other items, too, but the analysis was confined to "those particular items in which there was sufficient information to display statistically and to treat statistically".

The witness then further concluded (1) that the critical variables were race of the offender, race of his victim, and sentence; (2) compared to other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death; and (3) "no variable of which analysis was possible could account for the observed disproportionate frequency".

On cross-examination Dr. Wolfgang stated that the Arkansas report was "preliminary" in the sense that the

other states for which data was being collected would be included in the final report; that the 55 Arkansas cases did include some new trials; that, however, he did not think this disturbed his analysis; that he was only "very little" familiar with Arkansas geography; that he was "gratified the report is as good as it is"; that he used such variables as he could get information on; that if he had had more information, he could have used other variables and his report, accordingly, would have been more extensive; that reputation for chastity was presumed to be of some relevance but "unfortunately, there was not enough information upon which to make the analysis complete"; that as a criminologist he was willing to say "that an analysis of a social system—in this case, the judicial system—operated relative to the decision making regarding rape, is such that it casts considerable doubt upon the quality of justice in those particular cases throughout the system"; and that he has never sat on a jury but has been around them.

It was then agreed that among the 55 schedules there were 4 cases which concerned defendants convicted twice for the same rape as a result of a second trial. A fifth case was not one of repeated convictions but, instead concerned two victims.

Received in evidence was an exhibit prepared by the United States Bureau of Prisons. This showed that, for the years 1930-62, 446 persons were executed under civil authority in the United States for rape and that, of these, only 45 were white but 399 were Negro and 2 were of other races, and that, for the same period, 3,298 were executed for murder and, of these, 1,640 were white, 1,619 were Negro, and 39 were of other races.

The petitioner's second and only other witness was John Monroe, a Philadelphia statistician with 17 years'

experience in sampling and surveys. He testified that he was asked by Dr. Wolfgang to design a representative sampling of counties in 12 southern states so that inferences could be drawn for each state and for the region as a whole. Arkansas was included. The 1960 negro population was used as the measure. The sample size was determined largely on speculation as to what area the law students could cover in the time available to them. Nineteen Arkansas counties were selected. These contained more than 47% of the state's population. Mr. Monroe stated that his sample of Arkansas counties was a very reliable one under the restriction, that is, the number of counties that could be investigated during the time allotted. He went on to say that, so far as the sample is concerned, the inferences drawn from it were valid for Arkansas. Garland County was not one of those selected. This was because "the random number just didn't happen to fall in the population for Garland County". Had that county possessed more than 19,000 negro population it would have been selected. The witness conceded that he was sampling the negro population and not the entire population. This was because of the purpose of the study and, in order to compare negro and white cases, the sample has to provide enough of the former to make the findings valid.

The witness stated that he took the total negro population of Arkansas and divided it by the number of draws allocated to the State. This number turned out to be approximately 19,400. A random number between it and zero was selected. As adjacent county negro population added up to the random number plus 19,400, the county was selected. In this way, counties having more than 19,400 Negroes, or approximately that number, were taken consecutively.

On cross-examination it was pointed out that this method did not result in having the selected counties geographically disbursed throughout the State. Instead, the selected counties for the most part were in the east and south. This is where Arkansas' negro population is primarily located.

The court inquired what there was about the survey that gave it validity in Garland County. The answer was that the inferences drawn from the sample were valid for the State of Arkansas. Counsel then observed that it was not Garland County that convicted Maxwell and sentenced him to death but the State, and that the purpose of Mr. Monroe's testimony was to show that the counties selected were representative of the State.

On further cross-examination, the witness acknowledged that the northwestern part of the State was essentially the white population area, that the southeastern portion was the negro population area, and that Garland County was in the white area.

The State offered no evidence.

Such is the record. It is apparent from a reading of the record that the trial court was generous in its rulings on admissibility. Everything which the petitioner presented came in.

The trial court's conclusions on the statistical argument. Chief Judge Henley, in his opinion, pp. 717-21 of 257 F.Supp., described the statistical argument as the "contention which has been urged most seriously here". He referred to Professor Wolfgang as "a well qualified sociologist and criminologist" and to Mr. Monroe as "a qualified statistician". He observed that the investigation showed three categories, namely, rapes of white women

by negro men, rapes of negro women by negro men, and rapes of white women by white men, and that there was no conviction of a white man for rape of a negro woman. He noted that Dr. Wolfgang "concluded, and the Court agrees, that the differential could not be due to the operation of the laws of chance". He characterized Dr. Wolfgang's conclusions "to be that a Negro man who is convicted of raping a white woman has about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, whereas a man who is convicted of criminally assaulting a woman of his own race stands about only a 14 percent chance of receiving the death sentence". He acknowledged that "the statistical evidence produced in this case is more extensive and sophisticated than has been produced heretofore". Yet he was not convinced that "it is sufficiently broad, accurate, or precise as to establish satisfactorily that Arkansas juries in general practice unconstitutional racial discrimination in rape cases involving Negro men and white women. . . . The study does not indicate that Negro men convicted of raping white women invariably or even in the majority of cases receive the death penalty. . . . Only 7 Negro men were sentenced to die for raping white women. The case studies, and the number of death sentences imposed are simply too few in number to afford convincing proof of the proposition urged by petitioner". It is not correct, as Dr. Wolfgang said in his report, that the selected Arkansas counties are "representative of the state in urban-rural and white-Negro population ratios". The statistics "really reveal very little about the details of the cases" where the death sentence was imposed upon Negroes for raping white women as compared with other racial situations. "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases". The

court went on to observe that "In cases not involving inter-racial situations the issue of consent may be and frequently is very real", but that that issue "is much less likely to be present in cases in which white women have been attacked by Negro men".

The petitioner's argument. The petitioner appellant characterizes the present proceeding as one presenting "for the first time in any appellate court . . . a record which is the end product of a detailed and exhaustive examination of the practical consequences of the procedures used in making the decision whether a man should live or die". It is stated that the question in this record is one of proof, namely, whether the petitioner has made a sufficient showing of racially discriminatory capital sentencing under Arkansas rape statutes. It is pointed out that on three previous occasions, namely, in the Supreme Court of Arkansas, before Judge Young, and in this court, the answer has been in the negative, "notwithstanding that on each successive occasion the evidence tended in the direction of more depth and completeness". This demonstrates, it is said, "how difficult it is for Negro litigants generally and those without means particularly, to make courts see 'the reality of the world, indeed . . . the segregated world' [citing *Brooks* v. *Beto*, 366 F.2d 1, 12 (5 Cir. 1966), cert. denied 386 U.S. 975] . . . in which they live . . . the law [needs to] 'see what all others see' ".

The heart of the petitioner's statistical argument is then forthcoming. It is that on this record the petitioner has made a prima facie case of racial discrimination in sentencing and that he is entitled to prevail when, as here, the State presents no evidence or presents evidence of insufficient moment to overcome the prima facie case so established.

It is said that the Supreme Court of necessity has developed the doctrine that a prima facie showing of unequal racial treatment, calling state procedures in question, compels the inference that the State is drawing the racial line unless it offers justification in non-racial factors for the disproportion. Jury selection and voting dilution cases such as *Hernandez* v. *Texas*, 347 U.S. 475 (1954), and *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), are cited generally. Also cited, however, are other cases which, it is said, show that the prima facie approach has not been restricted to jury selection and voting cases. Among these are *Chambers* v. *Hendersonville City Bd. of Educ.*, 364 F.2d 189 (4 Cir. 1966) (reemployment of teachers), and *Cypress* v. *Newport News General & Nonsectarian Hospital Ass'n*, 375 F.2d 648 (4 Cir. 1967) (hospital staff membership). It is argued that there is no reason why the prima facie approach should not be applied to the present case. If there are factors which offset Dr. Wolfgang's expert conclusion, they were in the power of the State to unearth and prove. "Every justification for shifting the burden of persuasion to the State . . . applies with evident force here".

Finally, it is stated that the district court committed manifest error in its evaluation of the evidence. Counsel would dismiss the trial court's observation that the Arkansas figures contained instances of defendants tried more than once on the ground that each Arkansas jury death sentence is an indication of the application of the Arkansas statute. They would dismiss the trial court's concern with the small number of cases on the ground that the whole purpose of the statistical analysis was to satisfy Dr. Wolfgang as an expert and that he was so satisfied and his conclusions are sustainable under accepted scientific standards. They would dismiss the court's concern

with the geographical location of the selected Arkansas counties as unsupportable and improper. And they would dismiss the court's concern with the "issue of consent" as being "plainly the sheerest speculation". The observations are made that "any experienced criminal lawyer in the South . . . well knows that the failure to present the defense of consent in interracial rape cases is itself a product of the discriminatory pattern of Southern justice which petitioner here attacks", and that "Southern jury attitudes . . . have long impressed upon defense counsel the extreme unwisdom of advancing the consent defense on behalf of a Negro defendant where the complainant is white".[5]

The petitioner's argument is an interesting one and we are not disposed to say that it could not have some validity and weight in certain situations. Like the trial court, however, although perhaps not for each and all of the reasons it advanced, we feel that the argument does not have validity and pertinent application to Maxwell's case.

It is perhaps well to emphasize initially what the study and Dr. Wolfgang's testimony do not do or purport to do:

1. They do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted. They are concerned with 19 other Arkansas counties and with counties in 11 other states.[6]

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[5] However, the transcript of the state trial reveals that the defense in its opening statement made no less than five references to any act on the part of the prosecuting witness as being "free" and "voluntary".

[6] On the first habeas appeal we were unpersuaded with the statistics then presented or with the argument in support thereof. Some figures were submitted as to the entire State of Arkansas and as to three counties, namely, Garland (Hot Springs), Pulaski (Little Rock), and Jefferson (Pine Bluff). We said, pp. 330-31 of 348 F.2d

"The statistical argument is not at all persuasive. . . . As to Garland County, for the decade beginning January 1, 1954, Max-

2. They admittedly do not take every variable into account.

3. They do not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination.

4. They do not deny that generally the burden of demonstrating discrimination in penalty imposition is on the one who asserts it. *Maxwell* v. *Stephens*, supra, p. 330 of 348 F.2d, and cases cited; *Mitchell* v. *Stephens*, 353 F.2d 129, 133 (8 Cir. 1965), cert. denied 384 U.S. 1019.

What we are concerned with here is Maxwell's case and only Maxwell's case. And it is indisputable, from the record before us, that, despite the five references to "free" and "voluntary" in the defense's opening statement at the trial, there is no question, and no hint of one, as to the victim's lack of consent. The facts of the attack, which are not in dispute, which were reviewed by the Arkansas court, pp. 114-16 of 370 S.W.2d, and which we have again quoted above, include forcible entry of the home, physical assault on both the victim and her aged father, resistance by both, and the infliction of injuries on all three. The petitioner's attack, therefore, to the extent it would con-

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well's evidence was to the effect that seven whites were charged with rape (two of white women and the race of the other victims not disclosed), with four whites not prosecuted and three sentenced on reduced charges; that three Negroes were charged with rape, with one of a Negro woman not prosecuted and another of a Negro receiving a reduced sentence, and the third, the present defendant, receiving the death penalty. . . .

"These facts do not seem to us to establish a pattern or something specific or useful here, or to provide anything other than a weak basis for suspicion on the part of the defense. The figures certainly do not prove current discrimination in Arkansas, for in the last fourteen years the men executed for rape have been two whites and two Negroes.

"Turning to the three county statistics, we find no death sentence at all in Garland County in the 1954-1963 decade until Maxwell's case. We also find that of the two other Negroes charged, one was not prosecuted and the other was sentenced on a reduced charge."

cern itself with the issue of consent in rape cases, both interracial and noninterracial, and with allegedly purposeful avoidance of the consent issue by southern defense counsel, has no place here and, in its attempted application, is a straw argument based on speculation.

Further, while it is true that it is in a sense the state which prosecutes, nevertheless the county has a character and a posture, too. Inasmuch as Garland County, as it was conceded, is in the predominantly white area of Arkansas, one might expect from the petitioner an argument that alleged southern injustice in interracial rape cases would be more apparent in such a county than in those areas where the negro population is predominant. Yet the Garland County statistics, which we noted at pp. 330-31 of 348 F.2d, and which we have again recited by quotation in footnote 6, supra, afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.

We are not yet ready to condemn and upset the result reached in every case of a negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. This is particularly so on a record so specific as this one. And we are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South.

We therefore reject the statistical argument in its attempted application to Maxwell's case. Whatever value that argument may have as an instrument of social concern, whatever suspicion it may arose with respect to southern interracial rape trials as a group over a long

period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial. Although the investigation and study made by Professor Wolfgang in the summer of 1965 is interesting and provocative, we do not, on the basis of that study, upset Maxwell's conviction and, as a necessary consequence, cast serious doubt on every other rape conviction in the state courts of Arkansas.

At oral argument we asked Professor Amsterdam, counsel for Maxwell, whether (apart from any Eighth Amendment argument) his statistical approach would not mean that it would be constitutionally impossible for a negro defendant in Arkansas ever to receive the death penalty upon conviction of the crime of rape of a white woman. The answer given us was in the affirmative, that is, that it would be constitutionally impossible. At the same time it was conceded, in contrast, that it would be possible for a white man to receive the death penalty upon his conviction for rape. When counsel was asked whether this would not be discriminatory, the reply was that once the negro situation was remedied the white situation "would take care of itself".

The legal logic and the rightness of this totally escape us. If that end result would actually be forthcoming (and we wonder whether this may accurately be forecast), that fact does not, in our view, make it legally right or satisfy constitutional dictates. We still read the first section of the Fourteenth Amendment as proscribing the denial "to any person" within a state's jurisdiction of "the equal protection of the laws". We feel that this means what it seems to require, namely, protection which is equal, and that equal protection is denied if, factually, a member of one race (whether black or white) is subjected, because of

his race, to greater or different punishment than a member of another race. The argument therefore turns back upon and defeats the very side which here proposes it. We are not inclined to accept as constitutional doctrine an abstraction which provides equality only through assumed and hoped-for day-to-day practicalities. It is the law, not probabilities or possibilities, which must afford equal protection.

We can understand and appreciate the disappointment and seeming frustration which Maxwell's counsel must feel in again failing to prevail on a still more sophisticated statistical approach. They will ask themselves just how far they are required to go in order to prevail.

We are not certain that, for Maxwell, statistics will ever be his redemption. The facts as to rape charges in Garland County are known and have been recited. Standing by themselves, they disclose nothing from which conclusions of unconstitutionality in application may appropriately be drawn. This situation—the aridity of the Garland County facts on which to claim unequal protection of the laws—forces Maxwell and his counsel to present his case on a state-wide and long-term historical approach, and even on a South-wide one, and to claim that conclusions which, at best, are necessarily general have valid application to Maxwell.

We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But, as we have noted before, with respect to the issue of jury selection, improper state practice of the past does not automatically invalidate a procedure of the present. *Brown* v. *Allen*, 344 U.S. 443, 479

(1953); *Bailey v. Henslee*, 287 F.2d 936, 943 (8 Cir. 1961), cert. denied 368 U.S. 877. We do say that nothing has been presented in Maxwell's case which convinces us, or causes us seriously to wonder, that, with the imposition of the death penalty, he was the victim of discrimination based on race.

The Single Verdict Argument

This appears to divide itself into two parts. The first is that the Arkansas statutes which permit the state jury to choose between capital punishment and life imprisonment embrace no standards by which the jury is to exercise that choice and that, as a consequence, such jury procedure is unconstitutional. The second is that the state practice of submitting simultaneously to the jury the two issues of guilt and punishment in a capital case "compounds the vice of lawless jury discretion . . . by making it virtually impossible for the jurors to exercise their discretion in any rational fashion".

We are not persuaded by either argument.

A. We point out initially, as to the first, that the basic punishment imposed by § 41-3403 is death. This has been so at least since 1842. Act of December 14, 1842, § 1, p. 19. Capital punishment for rape has not yet been held to be violative of the Eighth and Fourteenth Amendments, although, as we noted on Maxwell's first habeas appeal, p. 332 of 348 F.2d, three Justices dissented from the denial of certiorari in *Rudolph v. Alabama*, 375 U.S. 889 (1963), and would have had the Court "consider whether the Eighth and Fourteenth Amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life". That, however, is a fact situation

different from the instant case. We say again that if the death penalty for rape is to be nullified on constitutional grounds, that step in the first instance is for the Supreme Court and not for this inferior federal court. See *Ralph v. Pepersack*, 335 F.2d 128, 141 (4 Cir. 1964), cert. denied 380 U.S. 925.

The life imprisonment alternative came into the Arkansas statutes by Acts 1915, No. 187, § 1, p. 774. In operation it gave the Arkansas jury the power to alleviate punishment and extend clemency in cases (rape being just one of that category) where death had been the only punishment theretofore prescribed. The 1915 statute thus was in the direction of leniency and not away from it. *Kelley v. State*, supra, p. 54 of 202 S.W.; *Bell v. State*, 120 Ark. 530, 180 S.W. 186, 190 (1915).

Further, the imposition of punishment by the jury, within statutorily prescribed limits, rather than by the court, is the usual routine in Arkansas criminal procedure. § 43-2145.

We reject the petitioner's argument here for a number of reasons: (a) it has no basis in legislative intent; (b) it would destroy by indirection a punishment which the legislature saw fit to impose, which has been a component of the State's criminal law for well over a century, and which in all that time has not been subjected to successful constitutional attack; (c) the defense in Maxwell's rape trial requested no instructional standards; (d) the jury choice provides room for attention to the very variables which Professor Wolfgang's study concededly did not reach; and (e) we are not convinced that the absence of expressly stated standards in the statute requires that it be forthwith condemned constitutionally. Jurors are not automatons. They are human beings. The jury system

appropriately assumes that jurors in their factual determinations bring into play their common sense and the experiences of life. Their choice between capital punishment and life imprisonment, as the entire Arkansas method of punishment imposition by the jury, is not startlingly or shockingly different from the situation where choice of punishment within statutorily prescribed limits is for the judge. See *Witherspoon* v. *Illinois*, . . . U.S. . . . (1968).

The authorities proffered by the defense are the well-known ones, such as *Herndon* v. *Lowry*, 301 U.S. 242 (1937), and *Winters* v. *New York*, 333 U.S. 507 (1948), which deal with vagueness in criminal statutes. But there is nothing vague, and nothing is claimed to be vague, in the substantive provisions of the Arkansas rape statutes. The petitioner's attack is directed to the punishment and not to the crime.

But it is said that *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) "supports, if it does not compel, the conclusion that unfettered jury discretion in capital cases is unconstitutional". *Giaccio* concerned an ancient Pennsylvania statute which permitted a jury to assess costs against a defendant acquitted of a criminal charge and which called for imprisonment if such costs so assessed were not secured. The Supreme Court held that the statute was invalid under the due process clause "because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs". P. 402. We think that the heart of the holding as to vagueness is that the offending statute "leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case". Pp.

402 03. The additional argument made in *Giaccio* that state court interpretations provided appropriate standards was also unavailing. At best, these centered generally in "some misconduct" which was "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs".

There is no question as to what is prohibited under the Arkansas rape statute. And the secondary argument in *Giaccio* is a far cry from that Arkansas statute. Of particular import is the Court's footnote 8, p. 405 of 382 U.S. to the effect that in reaching its conclusion that the Pennsylvania statute was invalid, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits". Mr. Justice Stewart, in concurring, p. 405, felt that, despite this disclaimer, much of the reasoning in the opinion served to cast doubt "upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense". No other Justice joined him in that observation. We have no alternative, therefore, except to conclude that footnote 8 means what it says and that the Court did not, by its decision in *Giaccio*, cast doubt upon the constitutionality of a state practice which leaves to juries the power to fix punishment within legally prescribed limits. This thought was specifically applied later in a capital case by the majority opinion in *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967).[7] We are not impressed with the defense's char

[7] "Nor is it contended that it is unconstitutional for the jury to assess the punishment to be meted out to a defendant in a capital or other criminal case, or to make findings as to whether there was or was not a prior conviction even though enhanced punishment is left to be imposed by the judge. The States have always been given wide leeway in dividing responsibility between judge and jury in criminal cases."

acterization of footnote 8 as only a "careful reservation of a question" and referable "to jury sentencing generally, not capital sentencing".

II. The second aspect of the argument is that the Arkansas single verdict procedure "raises the gravest questions of procedural fairness". The usual points are advanced, namely, the right to allocution; the restriction of this right in single verdict procedure; and the conflict in such procedure between that right and the right not to incriminate oneself. What is suggested is the split verdict procedure.

All these arguments were made and the same cited cases were considered when we heard en banc and decided *Pope v. United States*, 372 F.2d 710, 727-30 (8 Cir. 1967), judgment vacated on other grounds, ... U.S. ... (June 17, 1968). We recognized in that federal case that the issue was not an easy one, that it largely disappears when criminal procedure takes its traditional course and punishment is imposed by the judge rather than by the jury, and that the issue seems to suggest the possibility of the two stage trial. There, too, as here, no request was made of the district court for a two stage trial. We stated our position[8] and concluded that the unitary trial was not error. We felt fortified in that conclusion by the Supreme

[8] "We find ourselves about where the Second Circuit majority found itself in *Curry*. We are not disposed to say that, despite the long accepted unitary trial concept, the two-stage trial is not available at all. We are not disposed to say that a trial judge may not appropriately exercise his discretion in this area. But we are also not disposed to say that the trial court's failure to order *sua sponte* a two-stage trial for Duane Pope was error or an abuse of discretion.

"It may be that the two-stage trial can be appropriately developed and made to serve a useful purpose under these statutes as they presently exist. It may be that the better solution is for the statutes to be revised so as to place the punishment power back in the hands of the judge where it traditionally has rested. It may be that the ultimate answer is legislation authorizing some narrow appellate review of sentences in these extreme cases. These, however, are primarily legislative matters for the Congress and not for the judiciary."

Court's remark in *Spencer* v. *Texas*, supra, p. 568 of 385 U.S.:

> "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure."

Until the Supreme Court tells us otherwise, we feel that what we said and concluded on this point in *Pope* v. *United States* has equal application to this state case. We adhere to the result reached on this issue in that en banc decision.

The Jury Selection Argument

This point was made on the first habeas appeal and, although it has not been raised in the state court, it was carefully considered by this court and rejected. Pp. 332-34 of 348 F.2d. The argument urged on that appeal[9] was that in Arkansas at the time of Maxwell's trial petit jurors were selected from electors; electors were persons who had paid the State's poll tax; the official list of a county's poll taxpayers and the poll tax receipts specified race; and the jury list itself indicated race. Ark. Stat. Ann. §§ 39-208, 3-104.2, 3-118, and 3-227(b).[10]

We reviewed the applicable Supreme Court opinions and our own earlier decisions in *Bailey* v. *Henslee*, supra, 287 F.2d 936, and *Henslee* v. *Stewart*, 311 F.2d 691 (8 Cir.

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9 We there noted, p. 332 of 348 F.2d, that on the appeal, in contrast to the situation in the district court, pp. 213-16 of 229 F.Supp., no issue was raised as to deficiencies in the efforts or methods of the jury commissioners, as to under-representation of the negro race in the county jury lists, or as to any pattern of negro repeaters on the juries.

10 Amendment No. 51 to the Arkansas Constitution, known as the "Arkansas Amendment for Voter Registration without Poll Tax Payment", effective, except for one minor proviso, January 1, 1965, eliminated the poll tax requirement and with it the color references theretofore appearing in the cited statutes. See *Walker* v. *State*, 241 Ark. 300, 408 S.W.2d 905, 915 (1966), cert. denied 386 U.S. 682.

1963), cert. denied 373 U.S. 902, in each of which we had concluded that a prima facie case of limitation in jury selection, because of race, had been established. But we reached the opposite conclusion in Maxwell's first appeal, primarily *because there was no proof whatsoever that the jury list was compiled from the poll tax list.* The evidence was all the other way and uncontradicted, namely, that the list was first *independently* prepared and only then was the poll tax book consulted, as it had to be in order to ascertain that the persons tentatively selected were qualified electors. We felt that we could not say that, because the poll tax receipts and books designated race, it necessarily followed that every jury list in Arkansas was automatically unconstitutional; so to conclude would ignore the possibility of the selection being initially made, as the proof in Maxwell's case showed, wholly apart from the poll tax list. We adhered to this conclusion in the later similar case, on this point, of *Mitchell* v. *Stephens*, supra, 353 F.2d 129, 133-34.

Presumably, Maxwell and his counsel are not convinced of the rightness of our decision on this point in the first appeal. Nevertheless, the decision was made by a unanimous panel and the Supreme Court did not see fit to disturb it. Having decided the issue, we do not now undecide it in order to reach the opposite result.

The point is repeated, moreover, by Maxwell and counsel on his second habeas petition because, it is said, the granting of certiorari, limited to five questions, in *Sims* v. *Georgia*, 384 U.S. 998 (1966) [the same day certiorari was denied in *Mitchell* v. *Stephens*, supra] and the decision in *Whitus* v. *Georgia*, 385 U.S. 545 (1967), require reversal.

Sims v. *Georgia* was also an interracial rape case with a Negro as defendant. The fourth question as to which

certiorari was granted related to the constitutionality of a conviction where "local practice pursuant to state statute requires racially segregated tax books and county jurors are selected from such 'books'", where Negroes comprise only 5% of the jurors selected but about 20% of the taxpayers, and where the defendant offered to prove a practice of arbitrary and systematic Negro inclusion or exclusion based on jury lists of the prior ten years but his offer was disallowed. Sims' conviction was reversed and his case remanded on the ground that a voluntariness of confession issue was controlled by *Jackson* v. *Denno*, 378 U.S. 368 (1964), and that the Supreme Court of Georgia had erred in holding that *Jackson* was not applicable. This was the second of the five certiorari questions. The Supreme Court therefore did not reach any of the issues raised by the other four questions. *Sims* v. *Georgia*, 385 U.S. 538 (1967). The significance of the *Sims* case for Maxwell thus is that the Supreme Court was willing to grant, and did indeed grant, certiorari on a question related to racially segregated tax books, the selection of jurors from such books, the misproportion of negro jurors to negro taxpayers, and a disallowed offer of proof of arbitrary and systematic exclusion for ten years.

Merely stating the question reveals the inapplicability of the fourth Sims question to Maxwell's case. It is true that at the time of Maxwell's trial, as we have repeatedly noted, Arkansas procedure called for racially designated elector lists. But as has already been pointed out, the uncontradicted proof in Maxwell's case was that the petit jurors were not selected from those lists, although the lists were later checked, as they had to be, in order to determine that the jurors selected were qualified electors. There is no assertion here of misproportion of negro jurors

to negro taxpayers or negro electors or negro citizens. And there is nothing before us by way of claim of systematic negro exclusion on Garland County jury lists for any period of time.

Similarly, we fail to see where *Whitus* v. *Georgia* and subsequent rulings based on *Whitus*, namely, *Bostick* v. *South Carolina*, 386 U.S. 479 (1967); *Cobb* v. *Georgia*, 389 U.S. 12 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967); *Sims* v. *Georgia*, 389 U.S. 404, 407-08 (1967); see *Coleman* v. *Alabama*, 389 U.S. 22 (1967), afford anything new or anything not fully discussed and fully decided on Maxwell's prior habeas appeal. The Georgia jury lists, under attack in *Whitus*, were made up from a racially designated tax digest and by reference to the old jury list theretofore condemned in *Whitus* v. *Balkcom*, 333 F.2d 496 (5 Cir. 1964), cert. denied 379 U.S. 931. And again there was serious disproportion of negro representation. The Court quite expectedly held that such proof constituted a prima facie case of purposeful discrimination, for the fact situation fell in line with that in *Avery* v. *Georgia*, 345 U.S. 559 (1953), cited by the Supreme Court and also by us on the first appeal, p. 332 of 348 F.2d. A construction, for Maxwell's case, of footnote material similar to that found in *Jones* v. *Georgia*, supra, at p. 25 of 389 U.S., would be contrastingly revealing. In Maxwell's case, we repeat, we have no question whatsoever of inappropriate negro representation on the Garland County jury list, we have a negro commissioner, and we have jury lists independently prepared prior to the statutorily required reference to the poll tax rolls. The jury list, thus, was not prepared from condemned or racially designated lists. The petitioner's position here would render it impossible to try a negro defendant for any crime in the State of Arkansas prior to the adoption of Amendment No. 51. On the facts such a stricture is not constitutionally required.

Sims and *Whitus* therefore fail to afford reversing precedent.

Although the point has not been raised to us, a comment relative to the Supreme Court's recent decision in *United States* v. *Jackson*, ... U.S. ... (1968), may be indicated. In *Jackson* the Court held unconstitutional the death penalty provision of the Federal Kidnaping Act, 18 U.S.C. § 1201(a). Does that holding suggest the constitutional invalidity of the Arkansas death penalty for rape, under the Fifth and Sixth Amendments which now, through the Fourteenth, have an area of application to the states? See *Malloy* v. *Hogan*, 378 U.S. 1, 8 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

We readily conclude that *Jackson* does not require a holding of invalidity of the Arkansas death penalty. *Jackson*, as we read the opinion, pivoted on the fact that the defendant's assertion of his right to a jury trial might cost him his life, "for the federal statute authorizes the jury—and only the jury—to return a verdict of death" and thus subjects the defendant who does not plead guilty and who asks for a jury trial to the hazard of capital punishment. The Arkansas rape punishment situation is not the same. As we have pointed out above, the Arkansas procedure in criminal cases is for the jury to affix the punishment within the limits statutorily defined. § 43-2145. Although § 43-2306 provides that when a jury fails to agree on the punishment or to declare the punishment in their verdict or if they assess punishment not authorized by law, "and in all cases of a judgment on confession", the court shall assess and declare the punishment. But § 43-2108 states that a trial by jury may be waived "except where a sentence of death may be imposed". And the Supreme Court of Arkansas has spe-

cifically held in a rape case, where the defendant had entered a plea of guilty, that it was mandatory to impanel a jury to fix the punishment. *Scarber v. State*, 226 Ark. 503, 291 S.W.2d 241, 243 (1956). Thus, in contrast to the Federal Kidnaping Act, an Arkansas defendant, by entering a plea of guilty in a capital case, does not avoid a trial by jury on the issue of punishment. The critical choice under the federal act which occasioned the result in *Jackson*, is thus not present under the Arkansas statutes.

It is obvious, we think, that the efforts on behalf of Maxwell would not thus be continuing, and his case reappearing in this court were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion[1] who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary. We note, for what that notice may be worth, that the death penalty for rape remains available under federal statutes. 18 U.S.C. § 2031; 10 U.S.C. § 920(a).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[1] Judges Vogel and Matthes do not join in this comment.

Judgment of the Court of Appeals

(Filed July 11, 1968)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,746

SEPTEMBER TERM, 1967

WILLIAM L. MAXWELL,

Appellant

—v.—

O. E. BISHOP, Superintendent of the Arkansas State Penitentiary,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court of August 26, 1966, denying Petition for Writ of Habeas Corpus in this cause be, and the same is hereby, affirmed.

July 11, 1968

Order entered in accordance with Opinion:—

/s/ ROBERT C. TUCKER
Clerk, U. S. Court of Appeals
for the Eighth Circuit

Order Granting Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 622

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O. E. BUSHOR, Superintendent Arkansas State Penitentiary.

The petition for a writ of certiorari is granted, limited to questions 2 and 3 of the petition, which read as follows:

> 2. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?
>
> 3. Whether Arkansas' single-verdict procedure, which requires the jury to determine guilt and punishment simultaneously and a defendant to choose between presenting mitigating evidence on the punishment issue or maintaining his privilege against self-incrimination on the guilt issue, violates the Fifth and Fourteenth Amendments?

The case is placed on the summary calendar and set for oral argument immediately following No. 642.

December 16, 1968